

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Vonage Holdings Corporation)	WC Docket No. 03-211
)	
Petition for Declaratory Ruling Concerning)	
an Order of the Minnesota Public Utilities)	
Commission)	

REPLY COMMENTS OF 8X8, INC.

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8x8, Inc. ("8x8"), by its attorneys, respectfully submits these reply comments in the above-captioned proceeding on the propriety of the requirements imposed on Vonage Holdings Corporation by the State of Minnesota.

INTRODUCTION

On September 22, 2003, Vonage Holdings Corporation ("Vonage") filed a petition requesting that the Commission preempt an order of the Minnesota Public Utilities Commission ("Minnesota Commission") requiring Vonage to comply with state laws governing providers of telephone service.¹ Vonage argued that it is a provider of information services and asked that the Federal Communications Commission ("FCC" or "Commission") find that the certain specific E911 requirements imposed by the Minnesota Commission are in conflict with federal policies.² Additionally, Vonage stated that preemption is necessary because of the impossibility of separating the Internet, or any service offered over it, into intrastate and interstate components.³ As a

¹ Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211 (filed Sept. 22, 2003) ("*Vonage Petition*").

² *Id.* at 24.

³ *Id.* at 27.

provider of Voice over Internet Protocol (“VoIP”) technology and services, 8x8 supports the relief sought by Vonage in its Petition and offers the following reply to the Comments filed in response to the Vonage Petition. 8x8 urges the Commission to act now to ensure that this vibrant service sector can continue to flourish and bring consumers innovative, quality IP service choices.

DISCUSSION

I. FCC ACTION ON VONAGE’S PETITION IS WARRANTED BY LAW AND POLICY

A. Under the Telecommunications Act of 1934 and FCC Policies, VoIP is an “Information Service”

VoIP services provided by 8x8 and Vonage are neither “telecommunications” nor a “telecommunications service” and the provider of VoIP is not a telecommunications carrier or common carrier subject to Title II of the Communications Act of 1934.⁴ Rather, these services fall within the Commission’s definition of information services under the regulatory framework set forth in the *Stevens Report*, and are not regulated under Title II of the Communications Act. Many commenters have asserted that VoIP should be classified as a telecommunications service subject to regulation by the states,⁵ despite that in the *Stevens Report*, the FCC concluded that only one type of IP telephony, phone-to-phone IP telephony, possessed characteristics sufficiently similar to conventional telephony that it might be appropriate to consider it a “telecommunications service” rather than an “information service.” Under the four-part test set forth by the Commission in the *Stevens Report*, Vonage clearly does not fall within the “phone-to-phone”

⁴ Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (as amended).

category.⁶ The test set forth by the Commission specifies four defining characteristics of phone-to-phone IP telephony. These characteristics are:

(1) [the provider] holds itself out as providing voice services; (2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) it transmits customer information without net change in form or content.⁷

Commenters have asserted that Vonage's service does not involve a net protocol conversion from the end user's perspective.⁸ Even assuming that the end user must be aware at some level of a change in protocol, in the case of Vonage's offering, the user has chosen a VoIP solution and sees the benefit of the change to Internet protocol in the form of cost savings and increased functionality.⁹ To say that consumers are unaware that their communications are traveling over the Internet instead of a traditional phone line ignores that Vonage customers must install hardware that performs protocol conversion and that plugs into a DSL, cable modem or other broadband IP network rather than a phone jack.

⁵ Minnesota Statewide 911 Program Comments ("MN 911") at 2; Cinergy Communications Company Comments ("Cinergy") at 1; Montana Telecommunications Association Comments ("MTTA") at 2; DJE Teleconsulting, LLC Comments at 4; Independent Telephone & Telecommunications Alliance Comments ("ITTA") at 7; and others.

⁶ *Federal-State Joint Board on Universal Service*, Report to Congress, FCC 98-67, 13 FCC Rcd. 11501 (1998) ("*Stevens Report*") at 88; 8x8, Inc. Comments ("8x8") at 6; *See also* Level 3 Communications, LLC Comments ("Level 3") at 16; *See also* High Tech Broadband Coalition Comments ("HTBC") at 2; *See also* Cisco Systems, Inc. Comments ("Cisco") at 3.

⁷ *Id.*

⁸ MTTA at 3; Communications Workers of America Comments ("CWA") at 6; People of the State of California and the California Public Utilities Commission Comments ("California") at 11.

⁹ 8x8 at 3; Motorola, Inc. Comments ("Motorola") at 11; The Voice on the Net Coalition Comments ("VON Coalition") at 3; Cisco at 1.

Identifying the geographic location of users of VoIP services poses a difficult challenge.¹⁰ The architecture of the Internet is not segregated into intrastate and interstate network traffic.¹¹ A Vonage customer outside Minnesota, in another state or even a foreign country, may select a Vonage number in a Minnesota area code as a way of providing a local number for Minnesotans to call him or her. In this example, at least some calls would appear to be intrastate even though the called party is located in another state or even outside the United States.

VoIP companies, including Vonage and 8x8, are currently working on ways to more accurately identify the geographic location of a user for purposes of providing 911 type services,¹² and as VoIP matures, solutions to these technical issues will be developed. Until then, allowing state regulators to impose unworkable requirements designed for traditional telecommunications systems on VoIP providers would put many VoIP providers out of business and deprive the public of the benefits of VoIP technology and increased competition.¹³

B. It is Essential to Continued Growth and Development that the FCC Affirmatively Conclude that VoIP Services Fall Within the Definition of Information Services and Therefore Should Remain Unregulated by the States

As Chairman Powell indicated earlier this month, there is universal agreement that VoIP services hold great promise for the American people, and “[i]mposing regulatory burdens on these new and emerging Internet services, before the FCC fully engages the public and develops a comprehensive record, may have the unintended consequence of stifling its growth and deny-

¹⁰ 8x8 at 14; Cisco at 4; HTBC at 9.

¹¹ 8x8 at 13; Cisco at 4; HTBC at 8; VON Coalition at 15.

¹² *Vonage Petition* at 8; 8x8 at 16.

¹³ 8x8 at 13; Cisco at 6; Motorola at 5; USA DataNet Corporation Comments (“USA DataNet”) at 3.

ing the public benefits of that growth.”¹⁴ Allowing the states to individually regulate VoIP technology before the FCC is able to develop national standards would create a difficult environment for companies that still rely on outside investment to fuel innovation. Exposing VoIP technology to a multitude of differing regulations while still in the early stages of development would slow its adoption and greatly limit the number of companies who would be able to bring such services to market. One of the great benefits of VoIP technology is that it will increase competition in voice services, resulting in lower prices and more innovative services for the public.¹⁵ In a fragmented regulatory environment, fewer companies would be able to enter the market for VoIP services, and the promise of more competitive voice services may be lost.

C. Failure by the FCC to Act will Result in State Regulations that Conflict with Federal Policies

In *Vonage Holdings Corporation v. Minnesota Public Utilities Commission*, Judge Davis determined that Federal policies preempt Minnesota’s regulation of Vonage, observing that “[s]tate regulation would effectively decimate Congress’s mandate that the Internet remain unfettered by regulation.”¹⁶ Judge Davis further concluded that “Congress’s expression of its intent to not have Title II apply to enhanced services demonstrates its intent to occupy the field of regulation of information services.”¹⁷ Other commenters have claimed that VoIP is not an information

¹⁴ Letter from Chairman Michael K. Powell, Federal Communications Commission to The Honorable Ron Wyden, United States Senate (Nov. 5, 2003).

¹⁵ Marcelo Rodriguez, *Leaving the Phone Company Out of the Loop; Advances in Internet Telephony Slash Bills and Irk Bells*, San Jose Mercury News (Aug. 2003) at <http://www.bayarea.com/mld/mercurynews/business/6478054.htm>.

¹⁶ *Vonage Holdings Corporation v. Minnesota Public Utilities Commission*, Civil No. 03-05287 (MJD/JGL), Slip Op. at 2 (D. Minn., Oct. 16, 2003).

¹⁷ *Id.* at 19.

service, arguing that it does not provide enhanced communications.¹⁸ These commenters ignore the many enhancements to voice service made possible by using the Internet protocol suite. For example, the current Vonage service offering provides subscribers with the ability to retrieve voicemail via e-mail or a web interface, as well by phone. Many additional enhanced services are likely to be added as VoIP providers continue to innovate and seek to further differentiate their offerings from those of the legacy telephone carriers and their VoIP competitors, unless VoIP providers are subjected to costly and stultifying regulation.

The United States District Court in the District of Minnesota has ruled that federal law preempts the Minnesota Commission's regulation of Vonage.¹⁹ It is urgent that the FCC take action now to prevent VoIP providers from being forced to relitigate this issue in every state that imposes traditional telecommunications regulations that cannot be implemented by VoIP providers.²⁰ Several states have filed comments in this proceeding, indicating their belief that VoIP should be subject to state regulation as a common carrier service.²¹ Regulation imposed by any one of these states would impact the provision of VoIP services nationwide, due to the current impossibility of separating VoIP traffic into interstate and intrastate components.²² The Commission has recently indicated it will be initiating a Notice of Proposed Rulemaking on the regu-

¹⁸ CWA at 5; ITTA at 5; Verizon Comments at 7; Minnesota Independent Coalition at 14.

¹⁹ *Vonage Holdings Corporation v. Minnesota Public Utilities Commission*, Civil No. 03-05287 at 2.

²⁰ Cisco at 6; HTBC at 3; Level 3 at 16; USA DataNet at 3; VON Coalition at 13.

²¹ Iowa Utilities Board Comments ("IUB") at 2; Public Utilities Commission of Ohio Comments ("PUCO") at 6; California at 12.

²² *Vonage Petition* at 27.

lation of VoIP.²³ Allowing further state regulation of VoIP prior to the FCC's Rule Making will result in regulation that may be difficult to reconcile with federal policies, once developed.

It is important that the Commission provide guidance to state commissioners and courts to prevent ad hoc decisions that may not comport with federal policies. Ad hoc decisions cause intolerable uncertainty, disrupt business models, impose barriers to entry, and deter investment and innovation. As illustrated by the California Public Utilities Commission's Comments, VoIP issues are technical in nature and require in depth analysis of how the technology functions to insure that requirements imposed can be met by VoIP providers.²⁴

State commissions seem inclined to impose the same requirements on VoIP providers as on traditional voice services without recognizing the difference in the underlying technology.²⁵ To the extent that regulation is appropriate for voice applications on the Internet, such regulation should be developed on an appropriate record and with sensitivity to the technological capabilities and limitations of the medium.²⁶ Rules for one architecture should not be engrafted on a different technology as a matter of expediency, as seems to have been the case in Minnesota.

The requirements that have been imposed by the Minnesota Commission amount to "regulation for regulation sake," which is no more viable a policy than a "quacks like a duck" rationale. Consumer protection rules for VoIP should be developed to address actual consumer issues posed by the technology, not those posed by residual monopoly circuit switched technol-

²³ Letter from Chairman Michael K. Powell, Federal Communications Commission to The Honorable Ron Wyden, United States Senate (Nov. 5, 2003).

²⁴ California at 20.

²⁵ IUB at 1 (indicating that regulation of telecommunications services should be based on the function rather than the equipment or protocol used); California at 20; Washington Enhanced 911 Program Comments at 2.

²⁶ Level 3 at 3; MCI and Competitive Telecommunications Association Join Comments at 13; VON Coalition at 8.

ogy.²⁷ Legacy rules that were necessary under a monopoly regime are not necessary in the competitive market for VoIP services, because the forces of market demand and competition regulate VoIP in a way that does not occur under a monopoly system.

Emergency calling services are a good example of how competitive forces in the market for VoIP services are already leading to industry self-regulation. Vonage and 8x8 are developing 911 type services without the need for regulation, because such services will make our offerings more attractive to the public and provider better service to our customers. 8x8 agrees that VoIP providers have a responsibility to the public, but believes that as a matter of public policy emergency notification and other public safety requirements should be tailored to the technology's capabilities and recognize technological limitations. After more than a decade, wireless E-911 services with Phase 2 location data is only beginning to reach large portions of the U.S. population.²⁸ Overnight compliance by VoIP providers is not realistically achievable. VoIP providers are currently developing new and innovative solutions to emergency notification. Forcing unworkable traditional models of emergency notification could actually prevent these innovative solutions (such as emergency calls with both voice and video of the emergency) from being fully developed and introduced to the market. Allowing the development of new and different communications networks and emergency systems will lead to a more robust combined emergency alert system that will enhance public safety.

²⁷ Level 3 at 3.

²⁸ *Uneven Implementation of Wireless Enhanced 911 Raises Prospect of Piecemeal Availability for Years to Come*, Report to the Chairman, Subcommittee on Communications, Committee on Commerce, Science, and Transportation, U.S. Senate, GAO 04-55 (2003).

D. As the FCC Proceeds With its Notice of Proposed Rule-making, it Should Place a Moratorium on State Regulation Pending Further FCC Review

8x8 applauds the FCC's decision to address the issue of regulation of VoIP in a Notice of Proposed Rulemaking. While commenters have been overwhelmingly in support of a Notice of Proposed Rulemaking, there are differing opinions as to whether the FCC should make an interim ruling regarding the issue of state regulation of VoIP services.²⁹ 8x8 urges the Commission to place a moratorium on state regulation while it undertakes to address this issue. A uniform federal scheme is essential to preserving the vibrant and robust market for VoIP services, and state regulation in the interim would be premature. The FCC is clearly the regulatory body best equipped to fully understand the technological issues involved with VoIP, and to appropriately resolve issues of universal service, access charge reform, and consumer protection in consultation with the state commissions and other interested parties as appropriate. We ask that the Commission use its authority to help prevent the states from creating conflicting regulation before federal policy on the issue can be fully established.

CONCLUSION

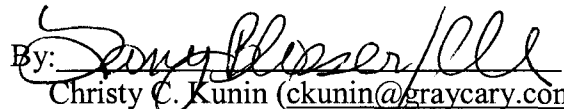
For the reasons set forth herein, 8x8 urges the Commission to help foster growth and innovation in the emerging VoIP services market by granting the relief sought in the *Vonage Petition*, and taking action to insure that conflicting state regulation does not emerge before the Commission is able to address these issues more fully.

²⁹ CWA at 4; Qwest Communications International, Inc. Comments at 3; ITTA at 17; BellSouth Corporation Comments at 2; The Alliance for Public Technology Comments at 1; (each calling for a comprehensive rule making and denial of the Vonage Petition). Time Warner Telecommunications, Inc. Comments at 1; Level 3 at 3; Motorola at 2; (each calling for a comprehensive rule making and a grant of the Vonage Petition).

Respectfully submitted,

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